No. 4052

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

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IN THE

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Statement of Facts.

On November 20, 1922, Lee Choy, the plaintiff in error, was indicted upon two counts for offenses against the opium laws of the United States. The first count (Record, p. 12) charged a violation of the Opium Law of 1909 as amended in 1914, referring to it by date, and was elaborated by a later instrument charging, over the signature of the United States Attorney, as follows (Record, p. 13):

Lee Choy "did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, twenty five-tael tins of opium, all of which said narcotic drug, as he, the said Lee Choy, then and there well knew, had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute," etc.

The second count (Record, p. 12) charged a violation of the Harrison Narcotic Act, referring to it by date, and was elaborated by a later instrument charging, over the signature of the United States Attorney (Record, p. 14), that Lee Choy did

"knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute twenty five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium, and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package."

The defendant, having been arraigned and having pleaded not guilty, was brought to trial, and upon

the 20th day of November, 1922, was found guilty by the jury upon the first count of the indictment, and not guilty upon the second count (Record, p. 15).

The evidence for the prosecution in brief was that of a woman (Mrs. Alapa) who claimed to have been the accomplice and tool of Lee Choy, who testified that Lee Choy had directed her to go aboard the "President Wilson"; that she had done so and had there received a vest which she put on, with the assistance of Lee Choy, under her dress, filled with opium tins; that upon her second trip, wearing such a vest, she was arrested, taken to the police station and searched by the matron, where the vest and its contents were discovered. (Record, pp. 67–82.)

After the search at the police station, the woman took the officers to the spot where she said she had left the first load of opium, though nothing was found there. On the return to the station, their auto was hailed by another car and stopped. In the other car was Lee Choy, who, being identified by Mrs. Alapa, changed cars at the request of the officers and returned to the station with them (Record, p. 83).

This story is supplemented by the evidence of three narcotic officers who participated in the arrest, of Detective McDuffie, who was with them, and of the matron (Record, pp. 140–189).

The tins taken from the woman were twenty in number and of these, the Territorial Food Inspector selected two at random, and upon testing them, found them to contain smoking opium (Record, pp. 63–66). *There was no evidence whatsoever at*

any time during the trial of the size or measurement of the tins or of the quantity of opium they held.

At the close of the evidence for the prosecution, the defendant moved for his discharge and an arrest of judgment upon the ground that the indictment was fatally defective as there was no charging clause, no finding clause, no recitation of the empanelment of the grand jury (Record, p. 228). These motions the Court denied. The defendant then offered his evidence.

The story of the prosecution was met by the absolute denial of the defendant and by evidence of an alibi to the effect that he was on the other side of the Island at the time with two other Chinese purchasing eggs in bulk for the store which employed him (Record, pp. 236, 237); that they returned to Honolulu about 11:30, and after having a little supper with one of the Chinese, Lee Choy and this Chinese started to drive home; that they met McDuffie's car, and when Lee Choy's companion said, "Hello, Mack," they were told to stop their car.

The verdict finding the defendant guilty upon the first count and not guilty upon the second, judgment and sentence were entered after a denial of a motion for a new trial. Immediately after such judgment and sentence, a writ of error was issued, upon which writ the cause is now in this Court.

Specifications of Error.

1. The indictment was void and required the discharge of the defendant.

2. The Court erred in refusing to instruct the

jury that each juryman must be convinced beyond a reasonable doubt before the defendant could be found guilty.

3. The verdict is inconsistent and repugnant, and therefore void.

Argument.

I.

The indictment was void and required the discharge of the defendant. (Specifications of error Nos. 3, 6, and 10.)

The purported indictment under which the defendant was charged was as follows (Record, pp. 11–14):

"In the United States District Court for the Territory of Hawaii.

October Term, 1922.

No. 3259.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE CHOY,
Defendant.

"INDICTMENT.

COUNT I.

"Violation of the Act of February 9, 1909, as amended by the Act approved January 17, *1924,* as amended by the Act of May 26, 1922.

COUNT II.

"Violation of Section I of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918. Re-enacted by Section 1005 of the Revenue Act of 1921.

"A true bill.

(Sgd.) JAMES F. FENWICK,
Foreman.

WILLIAM T. CARDEN,
United States Attorney.

"I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendant therein named, bail hereby being fixed at $——.

_____,
Judge, U. S. District Court, Territory of Hawaii.

"In the United States District Court in and for the Territory of Hawaii.

October Term, 1922.

"The United States of America,
"District of Hawaii,—ss.

COUNT I.

"The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid of the Court aforesaid, on their oaths, present that Lee Choy on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this Court, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought

into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney.

"In the United States District Court in and for the Territory of Hawaii.

October Term, 1922.

"The United States of America,
"District of Hawaii,—ss.

COUNT II.

"The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that Lee Choy on or about the 18th day of October, 1922, at and within the said district and within the jurisdiction of this Court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and dis-

tributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney."

An indictment which charges an offense merely by reference to the statute and without setting forth any charge against the defendant save the name of a statute is insufficient and void.

See The Schooner Hoppet vs. United States, 7 Cranch 389, 3 L. Ed. 380; United States vs. Boasberg, 283 Fed. 305.

The instrument returned by the grand jury is headed "Indictment" (Record page 12). It is endorsed "a true bill," signed by the foreman of the grand jury and by the United States Attorney. Otherwise it contains none of the elements necessary to an indictment. There is no charging clause, no finding clause, no recitation as to the empanelment of the grand jury. There is nothing to show whether opium or coca leaves, or salt or derivative of either, was the subject of traffic. Yet the definite allegation that the narcotic is a derivative of either opium or coca leaves, was required in United States vs. Hammers, 241 Fed. 542. The charge merely indicates in two counts the violation of two anti-narcotic statutes, referring to the statutes merely by date of enactment.

Following this and attached to the same paper was what might have constituted a sufficient indictment in the absence of the first purported indictment. (Record, pp. 13, 14). The second portion is not entitled an indictment, but sets forth in two counts that "the Grand Jurors empaneled, etc., present that Lee Choy did, etc.," charging Lee Choy in the language of the statutes referred to in the preceding indictment, with "importation," etc. "of opium," and concluding "contrary to form of statute * * * and against the peace and dignity of the United States." This was signed by the United States Attorney.

An indictment signed by the United States Attorney without endorsement by the foreman of the grand jury as a true bill may be good in the absence of a more authentic charge, but only by recourse to the presumption that it is returned and presented by the authority of the grand jury. On the other hand such presumption cannot apply when it is rebutted by the record itself which in this instance already showed a charge in the cause signed by both the foreman of the grand jury and the United States Attorney.

In other words, the first instrument entitled "Indictment" and signed by the foreman of the grand jury and the United States Attorney is the record and the evidence in this cause of what the grand jury found. Having returned that indictment under the signatures of the foreman of the grand jury and the United States Attorney, how can the United States Attorney either elaborate such indictment or

substitute another one for it under his own signature alone?

While the purported charge of the United States Attorney might have been sufficient in the absence of the instrument called an "Indictment," by virtue of the inference that he was acting for the grand jury and for the foreman of the grand jury in signing and returning the instrument, that presumption cannot exist when there is present on the record an indictment signed by the foreman of the grand jury himself as well as by the United States Attorney, with the endorsement, "a true bill."

The second part of this alleged indictment then can constitute nothing more than a bill of particulars furnished by the United States Attorney in elaboration of the indictment filed in the cause and signed and returned by the grand jury through its foreman. But a bill of particulars, of course, cannot remedy an indictment that is fatally defective because it lacks a charge. (Collins vs. United States, 253 Fed. 609; Foster vs. United States, 253 Fed. 481.)

It is submitted that there was no authority for such an indictment as was presented in this cause. The indictment returned by the grand jury through its foreman and the prosecuting attorney is of no avail because it fails to charge the defendant with any crime. It merely refers to "a violation of the act," etc. Yet, being upon the records and files it was evidence to the Court that it was the indictment returned by the grand jury. The subsequent instrument signed by the United States Attorney alone

must therefore be presumed to be without authority and of no significance as charging the defendant with any offense. Therefore the Court should have directed a verdict of not guilty for the defendant, or have granted the motion in arrest of judgment, or the motion for a new trial, and any verdict of guilty returned under such a defective indictment is void and the judgment based thereon cannot be affirmed.

II.

The Court erred in refusing to instruct the jury that each juryman must be convinced beyond a reasonable doubt before the defendant could be found guilty.

It is specified as error (covered by Assignments Nos. 12, 13 and 16) that the Trial Court refused to instruct the jury, in effect, that if any juryman was not satisfied or should entertain a reasonable doubt of the guilt of the defendant, after consultation with his fellow-jurymen, that the jury could not then find the defendant guilty. Two instructions (Nos. 14 and 15) were offered covering this point, and they were as follows (Record, p. 58):

"Instruction No. 14.

"If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty. (Hughes, Sec. 301, pg. 299.)

"Instruction No. 15.

"Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged, before he can, under his oath, consent to a verdict of conviction. If any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertains such reasonable doubt, the jury cannot, in such case, find the defendant guilty. (Hughes, Sec. 301, pg. 299.)"

The plaintiff in error urges that since he was entitled to a verdict of not guilty in the event that any one or more of the jurymen had a reasonable doubt of his guilt, that then he was clearly entitled to an instruction to that effect and that a mere general instruction such as Instruction No. 17 (Record, p. 50) given by the Court upon reasonable doubt did not cover this phase of the case. The instruction given by the Court went only to the mass conclusion of the jury, the mere numerical weight of opinion, and failed entirely to cover the possibility of one or two or more of the individual jurymen feeling a reasonable doubt of the guilt of the defendant and of the conduct required of them in such case, even though the remainder of the jury should feel an overwhelming conviction of the defendant's guilt.

That the defendant is and was entitled to an instruction covering the duty of each individual juryman in the event that such individual juryman, after consultation with his fellows, should feel a

reasonable doubt of the guilt of the accused, is settled by the authority of numerous well reasoned cases. Hale vs. State, 122 Ala. 85, 26 So. 236; Fletcher vs. State, 132 Ala. 10, 31 So. 561; Parker vs. State, 132 Ind. 284, 35 N. E. 1105; State vs. Ryno, Kans., 74 Pac. 1114. See also: Shepherd vs. United States, 236 Fed. 73, 79 (9th C. C. A.).

The plaintiff in error therefore respectfully submits that in the refusal of the Trial Court to instruct the jury that the doctrine of reasonable doubt was to be applied to the mind of each individual juryman after consultation and discussion with his fellows, the accused was deprived of a substantial right; and the refusal of the Court to give the jury the instructions asked for upon this point was prejudicial error warranting reversal of the judgment and verdict.

III.

The verdict is inconsistent and repugnant, and therefore void.

The third specification of error is based upon the repugnance and inconsistency of the verdict of not guilty upon the second count and of guilty upon the first, and is covered by assignments Nos. 16, 17 and 18. The second count of the United States Attorney's charge is as follows (Tr., p. 14):

> "that Lee Choy did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and

there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States."

The first count of the charge is as follows:

"that Lee Choy did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The evidence, as shown by the record, was concerned, upon both counts, with the same incident and the same drug. Therefore, it is a case of one transaction being the subject of two criminal charges.

But the jury found that Lee Choy did not purchase, sell, dispense, and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp, and yet, they did find that he received, concealed, bought, sold and facilitated the transportation, concealment and sale of 20 five-tael tins of opium after the same had been imported and brought into the United States, though he well knew they had been unlawfully imported and brought into the United States.

The result of the verdict of not guilty in the second count is one of two things, either one of which is equally fatal to the validity of the verdict of guilty on the first count: Under the finding under the second count, either the drug was unlawfully brought into the United States, or the defendant did not purchase, sell, dispense and distribute. If it was lawfully brought into the United States, then the verdict under the first count cannot stand, for it is essential to find the defendant guilty under that count that the narcotic should have been unlawfully imported into the United States. If, on the other hand, Lee Choy did not purchase, sell, dispense or distribute, then how could he have received, concealed, bought, sold, facilitated the transportation, concealment and sale of it?

Under the one count the jury has said that Lee Choy did not buy, sell, dispense and distribute opium. Under the other, it is said that he did buy, and sell it, and received, concealed and facilitated its transportation. And this verdict upon the two

counts, if the Court please, all concerned the one transaction.

The cases are unanimous that, where two counts of an indictment have reference to the same transaction and are inconsistent, the verdict cannot stand. Thus in Kuck vs. State (Ga.), 99 S. E. 622, the crime charged in the first count was that of selling spirituous liquors. The second count charged the having, controlling and possessing of spirituous liquors. The accused was held guilty on the first count and not guilty on the second. The Court said that there would be no inconsistency or repugnancy had the verdict been reversed to not guilty on the first count and guilty on the second, but there was inconsistency and repugnancy which required the verdict to be set aside as it stood, because if there were no having, controlling, or possessing, there could be no selling.

In Baldini vs. United States, 286 Fed. 133 (Ninth Circuit), the accused were charged with having liquor in their possession in the first count at Reno, and in the second count with maintaining a common nuisance by willfully and unlawfully keeping intoxicating liquor for sale at Tuscano Hotel in Reno. There were two defendants. One of them was held guilty under the first count and not guilty under the second, and the plaintiff in error was found not guilty on the first count and guilty under the second. The point being made that the verdict was repugnant and inconsistent, the Court said that if the two counts had related to the same transaction, the position taken by plaintiff in error

would be valid, and the verdict necessarily set aside. The Court approved its decision in Rosenthal vs. United States, 276 Fed. 714, but said that the distinction between that case and the case then under consideration was that the evidence in the latter showed that the counts referred to two entirely different transactions, and therefore there was no inconsistency and the verdict should stand.

In Rosenthal vs. United States, 276 Fed. 714, where the same transaction was involved in the two counts of the indictment, the verdict on the first count was to the effect that plaintiff in error neither bought nor received cigarettes which were stolen, and the verdict on the second count found that the plaintiff in error was at the same time and place in possession of the property with guilty knowledge that it was stolen. The Court held that the two findings were wholly inconsistent and conflicting, reversed the judgment and remanded it for a new trial.

It is submitted that these cases, two of them decisions rendered by this very Court, are conclusive in this case to the point that there was a necessary inconsistency in the verdict of guilty upon the first count of the indictment and not guilty upon the second count, and that the verdict of guilty against Lee Choy must therefore be set aside.

Respectfully submitted,

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